(1) Supreme Court, U.S.
FILED
041164 FEB 24 2005
OFFICE OF THE CLERK

No.

In the
Supreme Court of the United States

JOSEPH W. SALADINO, JR.,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether an assurance of no "federal prosecution" provided by a cross-designated [State-federal] prosecutor, relied upon by petitioner when he pled guilty to Illinois felony weapon offenses, prohibited subsequent federal prosecution for the same weapon offenses in violation of the Due Process Clause of the Fifth Amendment?

2. Whether the blended [almost] six-year pre-and-post-indictment delay between petitioner's offense, State prosecution and federal arrest, based on a sealed federal indictment, was violative of the Fifth and Sixth Amendments?

3. Whether in light of *United States v. Booker*, 543 U.S. —, 125 S.Ct. 738 (2005), the petitioner's mandatory federal guideline sentence must be vacated and remanded for resentencing?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Joseph W. Saladino, Jr. (hereafter petitioner), respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINION BELOW

The unpublished opinion of the United States Court of Appeals for the Seventh Circuit was filed on December 6, 2004. App. 1-9; available in 2004 WL 2924179. No petition for rehearing was filed.

JURISDICTION

The decision and judgment of the United States Court of Appeals for the Seventh Circuit was entered on December

6, 2004. App. 1-9, *infra*. The Court of Appeals for the Seventh Circuit had jurisdiction pursuant to 28 U.S.C. § 1291, and the United States District Court for the Northern District of Illinois, Western Division, had jurisdiction pursuant to 18 U.S.C. § 3231.

This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTION, STATUTES AND RULES

U.S. Constitution, Fifth Amendment

> No person shall be * * * [nor] be deprived of life, liberty or property, without due process of law * * *.

U.S. Constitution, Sixth Amendment

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, * * * to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

18 U.S.C. § 922(g)(1)

> It shall be unlawful for any person [to possess a firearm] after having been convicted of a crime punishable by imprisonment for a term exceeding one year.

18 U.S.C. § 922(o)(1)

> Except as provided in paragraph (2), it shall be unlawful for any person to transfer or possess a machine gun.

18 U.S.C. § 924(a)(2)

> Whoever knowingly violates subsection * * * (g) * * * of section 922 shall be fined as provided in this title, imprisoned not more than 10 years or both.

28 U.S.C. § 515(a) states:

> The Attorney General or any other officer of the Department of Justice, or any attorney specially appointed by the Attorney General under law, may, when specifically directed by the Attorney General, conduct any kind of legal proceeding, civil or criminal, including grand jury proceedings and proceedings before committing magistrates, which United States attorneys are authorized by law to conduct, whether or not he is a resident of the district in which the proceeding is brought.

28 U.S.C. § 543(a) states:

> The Attorney General may appoint attorneys to assist United States attorneys when the public interest so requires.

28 U.S.C. § 544 states:

> Oath of Office. Each United States attorney, assistant United States attorney, and attorney appointed under section 543 of this title, before taking office, shall take an oath to execute faithfully his duties.

STATEMENT

1. **Interrelated State Court Proceedings**: During the early morning hours of February 15, 1997, in Rockford, Illinois, petitioner was stopped for traffic violations. After failing roadside sobriety tests, he was charged with driving while intoxicated. Pursuant to a post-arrest inventory search, the trunk of petitioner's vehicle was searched which led to the recovery of two weapons in a locked duffle bag. Based on the above, petitioner was charged in the Winnebago Circuit Court (Illinois) with, *inter alia*, Illinois offenses prohibiting the possession of weapons after being convicted of a felony (his felony conviction was spread of record in 1964).

2. On February 13, 1998, petitioner, represented by counsel, entered an "open" guilty plea to the Illinois weapon offenses. That "open" guilty plea resulted from several conferences between the State prosecutor and petitioner's counsel. The State prosecutor had been occasionally "cross-designated" as an Assistant United States Attorney ("AUSA"). And, by virtue of that position, frequently communicated directly with the United States Attorney-in-charge of the Western District in Rockford, (see Affidavit of Prosecutor Mark Karner, Esq., App. 12-13, *infra*). Prosecutor Karner represented to petitioner's counsel that after conferring with the Attorney-in-Charge of the Western District—[that] there would be no federal prosecution based on petitioner's February 15, 1997 weapon/traffic arrest (Affidavit of Petitioner's attorney Jerry A. Lund, Esq., App.10-11, *infra*). Relying on that assurance from prosecutor Karner, petitioner pled guilty (absent a plea agreement). On April 8, 1998 petitioner was sentenced to two-years probation, conditioned upon alcohol abuse counseling, 200 hours of community service and a fine of $4,320.00. In April 2000, petitioner successfully completed his

probationary sentence (as confirmed in a later Federal Presentence Report, more *infra*).

3. **Federal Prosecution:** On February 12, 2002 (a day or two short of the expiration of the federal statute of limitations), petitioner was charged by the Special February 2002 federal grand jury, in Chicago (Northern District of Illinois, Eastern Division), with federal felony weapon offenses (felon-in-possession) pursuant to 18 U.S.C. §§ 922(g)(1), 922(o)(1) and 924(a)(2) (R. 1). Beyond peradventure, the Illinois and federal offenses were predicated on the same misconduct—petitioner's February 15, 1997 Winnebago County arrest where firearms were recovered from the trunk of his car.

On February 13, 2002 the government successfully moved that petitioner's indictment be sealed, and it remained "sealed" until January 16, 2003 when petitioner was arrested at his home in Rockford, Illinois (R. 2-3, 7-9).[1]

4. Petitioner, represented by new counsel, agreed with the U.S. Attorney in Chicago that the proper *venue* for petitioner's case was Rockford (Winnebago County), Illinois. Accordingly, on February 13, 2003, the district court in Chicago granted the parties joint motion to transfer this case to the Northern District of Illinois, Western Division (R. 14).

5. Upon appearing in the Western District, petitioner sought indictment dismissal predicated on, *inter alia*, the failure to afford a speedy indictment (and post-indictment delay). He further asserted that the government was

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[1] Thus, petitioner's federal indictment was returned 1,821 days after his state arrest, and the "sealed" indictment was served on petitioner 338 days thereafter (a total of 2,159 days—or about six-years—elapsed between his original arrest and the service/execution of this sealed federal indictment).

estopped from proceeding in this case because he [had] pleaded guilty to the same offense in February 1998, based on [a] "no-federal prosecution" pledge by the "cross-designated" State prosecutor Karner (Exh. to R. 31, App. 10-11, *infra*). The government opposed indictment dismissal and supported its position with attorney Karner's affidavit (R. 33, Exh. C; App.12-13, *infra*). The district court took the petitioner's motion and the government's opposition on the moving papers, and rejected petitioner's dismissal motion on November 19, 2003 (App. 16-19, *infra*).

On November 19, 2003, petitioner entered a conditional guilty plea, reserving his opportunity to challenge the district court's indictment dismissal rejection (R. 37-38). On March 25, 2004, the district court accepted the plea agreement and imposed a mandatory USSG sentence of 27 months (in pertinent part, App. 49, 57-58, *infra*). Within the fabric of the sentencing proceedings, the district court opined:

> This is an unusual case, and the government has every right to indict someone for the same conduct; although, they generally—it's really the exception that they do so, and, if they do so, it's normally done, in the few cases I've had it, soon after the offense was prosecuted in state court. I don't like both jurisdictions taking a shot at any defendant. I think it's just fair to take one court and prosecute. And then for the United States Government, with all its power, not only to take a second shot at him, but to do it five years later, it seems to me to be not in the best interests of the United States, and it gives the appearance of overreaching.
>
> Now, the government had some reason for doing this beyond, in my opinion, just the fact that they didn't like the probation that he got because if that

> was the only factor, the United States Attorney here, the supervising attorney, would have brought the prosecution. But somehow this came to the attention of somebody while some other investigation, the facts of which I know nothing about and have not been disclosed to me, they resurrect this case, and then they sit on the indictment for a year.
>
> All of that being said, it does not give the appearance of the proper exercise of the authority of the government, and, therefore, because of that, I am giving him the low end of the guideline range. * * *
>
> * * * * * * *
>
> In this circumstance, because of his medical condition, because the government waited six years before he was actually served with the indictment, I don't think the government is in any hurry in this case. *And, finally, there may be a point on appeal as it relates to the issue about the second indictment, after being told that there wouldn't be one.* I don't think the search and seizure issue is going anywhere, frankly, but you can always appeal it. *I don't know if the other issue is, but to me, it's the closest issue that some appellate court could take a look at it and say the government has gone too far.* * * *

App. 48-49, 50, *infra* (ital. emph. added).

After imposing the USSG sentence, the court considered release, pending appeal. Ultimately the district court eschewed ordering petitioner's release, pending appeal, but without government objection, enlarged petitioner's "surrender" date to January 18, 2005. Petitioner has

surrendered and is currently serving the imposed guideline sentence.

6. **U.S.C.A. 7 Proceedings:** Pursuant to his conditional guilty plea, petitioner prosecuted a direct appeal to the Court of Appeals for the Seventh Circuit. On December 6, 2004 the court of appeals affirmed the district court holding, *inter alia,* that the promise of "no federal prosecution" by the cross-designated local prosecutor was of no moment and not binding on the federal government. App. 4-5, *infra.* Further, the appellate court rejected the pre- and-post-indictment delay arguments finding no prejudice. App. 5-8, *infra.*

REASONS FOR GRANTING THE WRIT

1. This petition should be granted because over 93% of all State and federal criminal cases are resolved via guilty plea. Over three decades have passed since Chief Justice Burger penned the Court's position on unfulfilled promises within the fabric of guilty pleas:

> This phase of the process of criminal justice, and the adjudicative element inherent in accepting a plea of guilty, must be attended by safeguards to insure the defendant what is reasonably due in the circumstances. Those circumstances will vary, but a constant factor is that when *a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled.*

Santobello v. New York, 404 U.S. 257, 262, 92 S.Ct. 495 (1971) (ital. emph. added).[2]

Notwithstanding the distinct *due process* concerns voiced by the Court, neither the district court nor the court of appeals ruled in a manner consistent with this Court's precedent.[3]

Here, petitioner advances that there is precious little difference, if any at all, between an assurance made by a "cross designated" local prosecutor that no federal prosecution would ensue were petitioner to plead guilty to Illinois felony weapon charges, as opposed to the U.S. Attorney or an AUSA providing the same pledge. What difference does it make that the "cross-designated" prosecutor conveyed the "no federal prosecution" assurance, as opposed to that

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[2] In *Ricketts v. Adamson*, 483 U.S. 1, 107 S.Ct. 2680 (1987), Justice Brennan authored a dissenting opinion which included:

> The requirements of due process have guided this Court in evaluating the promises and conduct of state prosecutors in securing a guilty plea. *Santobello v. New York*, 404 U.S. 257, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971). There is no reason to ignore those requirements here.

483 U.S. at 13 (Marshall, Blackmun and Stevens, J.J.J., joining in Justice Brennan's dissent).

[3] During discovery segments of the district court proceedings, federal grand jury minutes were disclosed which revealed the realistic reason for federally prosecuting petitioner. As revealed by a grand jury FBI agent-witness, [the] "federal interests" had not been vindicated because of the sentence imposed in the State court (p. 10, n. 4 of Petitioner's opening U.S.C.A. 7 brief—quoting from pp. 13-14 of the federal grand jury report of proceedings dated February 12, 2002).

The government has not challenged this representation at any stage of this case.

assurance flowing from the lips or pen of the United States Attorney for the Western District (or his or her AUSA)?[4] Surely, within the context of the case at hand, it made no difference in that the affidavit of the local "and cross-designated" prosecutor clearly reflects that the federal government was not interested in prosecuting petitioner. App. 12-13, *infra*. And, it cannot be doubted that petitioner relied on the government's representation when he entered an "open" guilty plea to the Illinois felony weapon charges (Affidavit of Petitioner's then-counsel at App. 10-11 and district court findings, *infra*). And, the district court findings included [that] the prosecutor's representation "did influence defense counsel's decision to go ahead with the State prosecution," App. 17, *infra*.

Clearly, the cross-designated prosecutor acted with the knowledge and consent of the U.S. Attorney (in-charge) of the Western District, and therefore the government was bound by the proxy-promise of no-federal prosecution. Compare *United States v. Gebbie*, 294 F.3d 540, 549 (3rd Cir. 2002) (plea agreements negotiated on behalf of "the United States" obligates all U.S. Attorneys to honor them because every U.S. Attorney represents the government as a whole), *United States v. Harvey*, 791 F.2d 294, 302-03 (4th Cir. 1986) (plea agreement that was ambiguous regarding reach of immunity precluded further charges in other federal courts), *United States v. Randolph*, 230 F.3d 243, 249-51 (6th Cir. 2000) (plea agreement barring further prosecution, although entered in Texas, also barred prosecution in Tennessee for charges that could not be brought in Texas; decision following remand, 24 Fed.Appx. 376, 2001 WL 1518757 (6th Cir. 2001)), and *United States*

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[4] Pursuant to 28 U.S.C. §§ 515(a), 543(a) and 544, the appointment of special or cross-designated prosecutors means that those so appointed carry the authority and responsibility of an AUSA.

v. Van Thournot, 100 F.3d 590, 594-95 (8th Cir. 1996) (promise in plea agreement made by the Assistant U.S. Attorney of the District of Wyoming to recommend concurrent terms binding on District Attorney in Southern District of Iowa).

Further, in *United States v. 25 Sandra Court, Sandwich, Illinois*, 135 F.3d 462 (7th Cir. 1998), the court, while affirming summary judgment in favor of the government in a civil forfeiture action, explained:

> It is certainly possible for the United States to "adopt" a state prosecution or to bind itself to the terms of a state's plea agreement. See *United States v. Fuzer*, 18 F.3d 517, 520 (7th Cir. 1994). But such a commitment requires much more than the mere participation of a federal agent in a state's investigation. *It requires the consent of the federal government, see id., or at least that of a state officer acting as the federal government's agent*, see *United States v. Long*, 511 F.2d 878, 880 (7th Cir. 1975), certiorari denied, 423 U.S. 895, 96 S.Ct. 196, 46 L.Ed.2d 128.

135 F.3d at 464 (ital. emph. added).

The court of Appeals principally relied on *United States v. Allen*, 930 F.2d 1270 (7th Cir. 1991) and *United States v. Fuzer*, 18 F.3d 517 (7th Cir. 1994), while rejecting petitioner's [cross-designated prosecutor] assurance *vel non* arguments. App. 5, *infra*. Neither support relief rejection in the case at hand. In *Allen*, the published decision reflects that he pled guilty to state charges arising from the same drug investigation and "somewhat cryptically," contended that his State guilty plea warranted dismissal of the federal charges. The affirming panel noted:

> Scott points to nothing in the record that indicates the plea agreement dealt with federal charges *or*

> *that any promises or commitments were made to the defendant with respect to federal charges.*

930 F.2d at 1274 (ital. emph. added). And in *Fuzer*, the court rejected similar relief, following successive State and federal prosecutions, where there was no intimation that the United States Attorney "was a party" to the agreement, 18 F.3d at 519.

But the case at hand is decidedly different: the State prosecutor, while not specifically "cross-designated" *in this case* (see 28 U.S.C. §§ 515(a), 543(a) and 544), nonetheless conferred with the United States Attorney-in-charge of the Western District and then related to petitioner's counsel that there would be no federal prosecution.

Once petitioner's counsel was so assured, an "open" guilty plea to the State weapon charges proceeded apace. Surely petitioner, lacking any understanding of nuanced State-federal separate sovereign concerns, had no reason to question the State-federal cooperation agreement. Compare *Finch v. Vaughn*, 67 F.3d 909, 915 (11th Cir. 1995) ("*Finch* not only was unable instinctively to appreciate the allocation of State and federal prosecuting and sentencing authority and he was given no reason to question that the two governments would not cooperate . . . .").[5]

No need to gild the lily: the facts are straightforward. And, in the last analysis, the question is plainly whether

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[5] The record is silent regarding the *Petite* policy, see *Petite v. United States*, 361 U.S. 529, 530-31 (1960) (*per curiam*). Petitioner acknowledges that the *Petite* policy confers no rights flowing to the defendant, and is an internal government guideline. Nonetheless, this case may provide a stark example of the government's failure to adhere to its internal policies; *Dual Prosecution and Successive Federal Prosecution Policies*, United States Attorney's Manual, 9-2.031 (2000) (describing mechanics of *Petite* policy).

defense counsel can rely on prosecutors to live up to their obligations and representations. As example, in *Shih Wei Su v. Filion*, 335 F.3d 119 (2nd Cir. 2003), the court reversed § 2254 rejection while discussing, *inter alia*, the *Brady* doctrine and whether defense counsel ought rely on the representations of an opponent within the fabric of the criminal justice system. The court explained:

> But even apart from that, the Supreme Court, in an analogous situation, has made clear that conscientious counsel *can* rely on prosecutors to live up to their obligations.

335 F.3d at 128 (italics in original). Thereafter, the *Filion* panel quoted from *Strickler v. Greene*, 527 U.S. 263, 286-87, 119 S.Ct. 1936 (1999) ("The presumption, well established by tradition and experience, that prosecutors have fully discharged their official duties is inconsistent with the novel suggestion that conscientious defense counsel have a procedural obligation to assert constitutional error on the basis of mere suspicion that some prosecutorial misstep may have occurred.") (internal citations and quotation marks omitted)).

Hopefully, the government will forego electing to parse and quibble. Perhaps not. But the abiding principle that "[a] deal is a deal and the government's word must be its bond," must inform this Court's decision.[6] Given petitioner's unusual circumstances, but, in light of the recurrent successive State-federal prosecutions [for essentially the same offenses], this case may provide an appropriate vehicle for the resolution of the vexing questions that recur in successive State-federal prosecutions where the State prosecutions were resolved via [a] guilty plea.

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[6] The "deal is a deal" is cited from *San Pedro v. United States*, 79 F.3d 1055, 1076 (11th Cir. 1996) (dissenting opinion).

—♦—

2. In pertinent part the Sixth Amendment to the United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy * * * trial * * *."

The facts below are pristine.

a) On February 15, 1997 petitioner was arrested in Rockford, Illinois (Winnebago County), and charged with felonious possession of weapons (after having been convicted of an Illinois felony in 1964).

b) After several conferences between petitioner's counsel and the "cross-designated" State prosecutor (with an assurance of "no federal prosecution") petitioner proffered an "open" guilty plea to the State felon-in-possession charges (April 8, 1998). Petitioner was sentenced to two years probation with multiple conditions which included alcohol counseling, community service and the payment of a $4320 fine. Petitioner paid the fine and successfully completed his Winnebago county probation during April 2000.

c) On February 12, 2002, petitioner was charged with federal violations (felon-in-possession) emanating from the same offense. On February 13, 2002, and thereafter, petitioner's indictment was sealed on the government's motion (R. 4-5).[7]

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[7] The government's "sealing" importunings disclosed only that there was an ongoing, unrelated federal grand jury investigation and were the indictment not "sealed" prejudice to the government might ensue (R. 4). The government's second "sealing" motion repeated that an undisclosed, unrelated investigation was ongoing (April 16, 2002; R. 5). Now, an additional two years have elapsed and nothing has come forward to justify the government's *ex parte* "sealing" filings.

d) On January 16, 2003 the indictment was "unsealed" and petitioner was arrested at his home in Rockford, Illinois (R. 7-9). At all times pertinent petitioner was known by his given name and resided at the same address in Rockford, Illinois. Calendar calculations reveal that the service and execution of the federal indictment occurred *one month short of six years after the triggering events—[the] February 15, 1997 traffic-weapons seizure arrest.*

In due course petitioner sought indictment dismissal based upon the unwarranted delay between his original arrest, the conclusion of the State charges, the "sealed" federal indictment and his arrest (R. 31). The government opposed indictment dismissal predicated on pre-and-post-indictment delay asserting, *inter alia*, that petitioner had not demonstrated any prejudice (R. 33 at pp. 4-5). On November 19, 2003 the district court rejected petitioner's constitutional plaints again, explaining, that the petitioner had not shouldered his prejudice-burden (R. 39, App. 17-19, *infra*). Within the U.S.C.A. 7 affirmation, the court rebuffed petitioner's speedy trial plaints (both pre-and-post-indictment) noting that under established precedent, petitioner [must show] "substantial prejudice to his right to a fair trial." App. 7-8, *infra*. And, regarding post-indictment delay the court analyzed the quartet of *Barker v. Wingo*, 407 U.S. 514 (1972) criteria concluding that the eleven-month post-indictment delay was justified because the government had a legitimate reason for "sealing" the indictment. App. 6-8, *infra*.

In *Doggett v. United States*, 505 U.S. 647, 112 S.Ct. 2686 (1992), the Court examined and modified the *Barker*

inquiries.[8] In *Doggett*, the Court held that under the Sixth Amendment, an eight-and-one-half-year delay between indictment and trial accorded the defendant a plane of *presumed prejudice* warranting indictment dismissal. This Court clarified how the quartet of [*Barker*] factors used to analyze a defendant's Sixth Amendment speedy trial claim based on a post-indictment delay are weighed, and the burden each party carries. The initial inquiry is whether the delay was long enough to trigger a "speedy trial analysis." *Id.* at 651-52. Ordinarily it accepted that a post-accusation delay approaching one year is adequate. *Id.* at 652, n. 1.

The balance of the factors, the length of the delay, the reason for the delay and defendant's diligence in asserting his or her rights is weighed against the prejudice to the defendant. *Id.* at 656-57. It is clear from *Doggett* that the longer the delay the greater the presumption of prejudice and, prejudice is presumed in some cases, relieving the defendant of any burden to show actual prejudice. *Id.* at 656-57. The Court further explained that "different weights are to be assigned to different reasons for delay," 505 U.S. at 657. Where the government diligently pursues a defendant from indictment to arrest, a speedy trial claim will always fail without a showing of actual prejudice. On the other hand, if "the Government had intentionally held back in its prosecution . . . to gain some impermissible

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[8] The *Barker* prejudice prong has a trio of components: (i) to prevent oppressive pretrial incarceration; (ii) to minimize the anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired, 407 U.S. at 530. *Barker* and *Doggett* were the subject of extensive analysis in *Jackson v. Ray*, 390 F.3d 1254, 1260-67 and nn. 2-4 (10th Cir. 2004) (affirming rejection of relief pursuant to 28 U.S.C. § 2254 where issue on review related to speedy trial).

advantage at trial," that weighs heavily against the government. *Id.* The Court explained that:

> Between diligent prosecution and bad-faith delay, official negligence in bringing an accused to trial occupies the middle ground. While not compelling relief in every case where bad-faith delay would make relief virtually automatic, neither is negligence automatically tolerable simply because the accused cannot demonstrate exactly how it has prejudiced him.

505 U.S. at 656-57. The Court also noted:

> "[w]hen the Government's negligence thus causes delay six times as long as that generally sufficient to trigger judicial review, and when the presumption of prejudice, albeit unspecified, is neither extenuated, as by the defendant's acquiescence, nor persuasively rebutted, the defendant is entitled to relief."

505 U.S. at 658 (footnotes and citations omitted). Finally, in *Doggett*, even though the defendant was unaware of the indictment and was unable to demonstrate *actual prejudice*, that factor was not fatal in that the weight of the composite facts warranted a presumption of prejudice. *Id.* at 657-58 (ital. emph. added; see, *e.g.*, *Moore v. Arizona*, 414 U.S. 25, 27, 94 S.Ct. 188 (1973) ("Barker v. Wingo expressly rejected the notion that an affirmative demonstration of prejudice was necessary to prove a denial of the constitutional right to a speedy trial[.]").

In the case at hand, the government was clearly negligent (to say the least) in failing to pursue the federal case against petitioner, waiting 1,812-days to seek the federal indictment and another 338-days thereafter to unseal the indictment and arrest petitioner. Those circumstances mandate the Sixth Amendment's presumption of prejudice (per *Doggett*).

Sister circuit decisions examining *Doggett* include *United States v. Bergfeld*, 280 F.3d 486 (5th Cir. 2002) and *United States v. Cardona*, 302 F.3d 494 (5th Cir. 2002). In *Bergfeld*, the district court rejected the defendant's indictment dismissal motion where the underlying facts giving rise to the federal charges occurred in 1992. A federal grand jury returned a multi-count indictment against *Bergfeld* and others on June 7, 1995 but did not "unseal" the indictment until on or about September 10, 2000. *Bergfeld* was arrested shortly thereafter, and moved for indictment dismissal contending the delay between the indictment and trial violated his "Sixth Amendment" right to a speedy trial, 280 F.3d at 487-88. After the district court denied the speedy trial motion, the defendant pled guilty while reserving his right to challenge the rejection of his speedy trial plaint. The court analyzed *Doggett* and determined that the government's delay fell within *Doggett* "official negligence" category but because the district court improperly analyzed the "prejudice" factor, the court reversed. While explaining the *Doggett* rationale, the reviewing court determined that the district court erred in its *Doggett* analysis—the district court started with the absence of specific evidence of prejudice—as opposed to looking to the length of the delay and the reason for the delay which gives rise to a presumption of prejudice, 280 F.3d at 490-91. In the end the court held that the five-year delay caused by the government's negligence entitled *Bergfeld* to a presumption of prejudice warranting indictment dismissal. *Id.* at 491.

Similarly, in *United States v. Cardona*, 302 F.3d 494 (5th Cir. 2002), the court considered the following facts: On April 23, 1995, *Cardona* and others were indicted in Texas for cocaine conspiracy offenses. A warrant issued for his arrest but he was not arrested until October 28, 2000; 302 F.3d at 496. *Cardona* moved for indictment dismissal regarding the delay in executing his arrest warrant which

(according to *Cardona*) violated his right to a speedy trial. The court reversed and ordered the indictment be dismissed while analyzing the *Doggett* factors including, *inter alia*, the presumption of prejudice. *Id.* at 498-99.

In this case the district court rejected petitioner's motion for indictment dismissal and addressed the proposition that he had failed to show prejudice (App. 18-19, *infra*). In a nutshell, the district court failed to correctly calibrate *Doggett* into its speedy trial-Sixth Amendment analysis. Had the lower courts correctly evaluate[d] *Doggett*, it would have (and should have) held that the "presumed" prejudice was such that petitioner did not bear the burden of demonstrating actual and substantial prejudice—because—that prejudice (as in *Doggett*, *Bergfeld* and *Cardona*) is, and was, "presumed." Thus, the district court's decision, supported by appellate affirmation, was clearly wrong and should be reversed.

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3. Whether in light of *United States v. Booker*, 543 U.S. —, 125 S.Ct. 738 (2005), the petitioner's mandatory Federal Guideline Sentence must be vacated and remanded for resentencing?

On March 25, 2004 petitioner, pursuant to his guilty plea, was sentenced to [a] *mandatory federal guideline sentence of 27 months* (impacting segments of judgment and commitment order reproduced at App. 56-58, *infra*). According to 18 U.S.C. § 924(a)(2) petitioner could have been sentenced to a fine, or not more than ten years, or both. Thus, petitioner could have been sentenced to a fine, probation, or a sentence of federal immurement. See *United States v. Pabon-Cruz*, 391 F.3d 86, 102-03 (2nd Cir. 2004) (analyzing "Enrolled Bill Rule/Doctrine" while considering legislative history and statutory language of an antecedent provision of 18 U.S.C. § 2251(d) concluding that "or both" means that a fine or probation remains a

sentencing option). Justice Stevens' majority opinion in *Booker* clearly impacts the sentencing in this case because the district court felt that the mandatory sentencing guidelines demanded a prison sentence (plain error; *Johnson v. United States*, 520 U.S. 461, 467-68, 117 S. Ct. 1544 (1997)).

While surely the last word has yet to be written (or voiced) regarding *Booker/Fanfan*, it is clear that the *mandatory* imposition of a sentence pursuant to the Federal Sentencing Guidelines is no longer valid. And, while Justice Breyer's majority opinion includes the admonition that the guidelines remain "advisory," that, standing alone, invites remand and resentencing to provide the district court with the initial opportunity to determine the reasonableness of petitioner's sentence. Hence, as to this issue, the January 12, 2005 *Booker/Fanfan* decision should culminate in the granting of the writ, vacation of the judgment below, and remandment for further proceedings.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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